morals is more seriously involved in the former than in the latter case. So that, although there are no authorities to directly support such a proposition, it may fairly be contended that, where a statute, by way of compensation rather than as a penalty, allows a recovery for injuries causing death, that recovery should be enforceable by the party designated by the statute, in the courts of any State or country that can obtain jurisdiction of the person of the defendant.

Jesse W. Lilienthal.

NEW YORK, September, 1889.

THE DOCTRINE OF STARE DECISIS AS APPLIED TO DECISIONS OF CONSTITUTIONAL QUESTIONS.

THE doctrine of *stare decisis*, which is firmly imbedded in our law, has, like all general rules and doctrines, many limitations and qualifications. Not every decision is entitled to its application and protection. The following definition has been supposed to present the rule with the ordinary practical qualifications approved by our best law courts: "A deliberate or solemn decision of a court or judge, made after full argument on a question of law fairly arising in a case and necessary to its determination, is an authority or binding precedent in the same court, or in other courts of equal or lower rank within the same jurisdiction, in subsequent cases where the very point is again presented; but the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible." [1]

Accepting this definition, our query is, whether the doctrine ought to be, or is, less strictly applied to decisions of constitutional questions than to questions of mere private right.

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[1] Chamberlain's *Stare Decisis*, p. 19.

The second legal-tender decision of the United States Supreme Court — Knox *v.* Parker (12 Wall. 457), reversing the first decision of that court, Hepburn *v.* Griswold (8 Wall. 603) — called attention to this point. In the former case, Mr. Justice Strong, delivering the opinion of the court, says of the latter case (p. 554): —

That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard by a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right.[1] We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately; but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both judgments.

Mr. Justice Bradley, also, delivering a concurring opinion, says, (p. 569): —

Regarding the question of power as so important to the stability of the government, I cannot acquiesce in the decision of Hepburn *v.* Griswold. I cannot consent that the government should be deprived of one of its just powers by a decision made at the time and under the circumstances in which that decision was made. On a question relating to the power of the government, when I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable unanimity and acquiesced in by the majority of the court. Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision. . . . It should be remembered that this court

[1] Briscoe *v.* Bank of Kentucky, 8 Peters, 118.

at the very term in which, and within a few weeks after, the decision in Hepburn *v.* Griswold, was delivered, when the vacancies on the Bench were filled, determined to hear the question reargued. This fact must necessarily have had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal.

In the dissenting opinion of Chief Justice Chase, he says (p. 572): —

A majority of the court, four to five, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three in pursuance of an opinion formed after repeated arguments, at successive terms, and after careful consideration. . . . And this reversal, unprecedented in the history of the court, has been produced by no change in the opinions of those who concurred in the former judgment. . . . The court was then full, but the vacancy caused by the resignation of Mr. Justice Grier having been subsequently filled, and an additional justice having been appointed under the act increasing the number or judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the court, as now constituted, upon the question.

Mr. Justice Field, also, delivering a dissenting opinion, says (p. 634): —

The judgment in Hepburn *v.* Griswold was reached only after repeated arguments were heard from able and eminent counsel, and after every point raised on either side had been the subject of extended deliberation. . . . It is not extravagant to say that no case has been decided by this court since its organization, in which the questions presented were more fully argued or more maturely considered. It was hoped that a judgment thus reached would not be lightly disturbed.

The late Mr. Justice Matthews, in a letter to the writer in 1885, in allusion to the writer's published essay on *Stare Decisis*, expressed regret that the essay had not considered the question of "the applicability, or the extent of the application, of the doctrine to constitutional questions." No intimation, however, was given of the distinguished jurist's opinion upon the point.

If the question be to any extent an open one, it is practically a grave and interesting one, and it may not be amiss to inquire

what grounds there may be, if any, differentiating constitutional questions from other questions in this regard.

Chief Justice Chase, in the legal-tender cases, speaks of the reversal there in 1871, as "unprecedented in the history of the court;" and Judge Field implies, if he does not assert, the same. Judge Strong, in the majority opinion, as above quoted, refers only, as authority, to Briscoe *v.* Bank of Kentucky. In that case, decided with New York *v.* Milne, in 1834, Chief Justice Marshall said :—

> The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present (p. 121).

A reporter's note adds that "Mr. Justice Johnson and Mr. Justice Duvall were absent when these cases were argued." The court then consisted of seven members.

This authority is perfectly plain. The rule of practice stated is, that a majority of a full court — certainly nothing more — ought to join in deciding constitutional questions. A quorum of the Supreme Court has always been fixed by statute, and in 1834. was five. In ordinary cases, in distinction from constitutional cases, a majority of a quorum is sufficient for a decision. Judge Strong's remark, that, "we have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right," and his reference to Briscoe *v.* Bank, can only refer to the rule of practice requiring ordinarily the concurrence of a majority of a full court in the decision of constitutional cases. It can have no reference to the duty of the court to abide by decisions once made in accordance with this rule of practice, in cases involving constitutional questions.

The allusion made by Judge Strong, to the court then consisting of less than the members provided by law, is inaccurate. The case was decided November 27, 1869, and the act of April 10, 1869, raising the number of judges to nine, did not take effect, by its terms, until December 1, 1870.

Judge Bradley's remark above quoted, that "at the very term in which, and within a few weeks after, the decision in Hepburn *v.* Griswold was delivered, when the vacancies on the bench were filled, the court determined to hear the question reargued," and the conclusion he draws from this fact, that it "had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal," have reference, it is supposed, to the well-known rule of practice of the court of hearing cases reargued, under appropriate circumstances, where the motion for reargument is made at the same term in which the first decision was rendered. But it must be noticed, that no motion to reargue Hepburn *v.* Griswold was made or granted, but only a motion to "hear the question (*i. e.*, the legal-tender question) reargued." The case, therefore, was not within this rule of practice.

No other grounds of exception from the rule, in regard to the legal-tender cases or constitutional cases in general, are suggested in support of the action of the court in disregarding the doctrine of *stare decisis* on that occasion.

The exact facts of those cases ought to be borne in mind. When Hepburn *v.* Griswold was decided, the court consisted of eight members, — the youngest of whom, in service, had been a member sixteen years, — and all were present at the arguments and at the decision.[1] Five members of the court joined in the decision. Under the rule of practice, therefore, of Briscoe *v.* Bank, this decision was all, in point of regularity and authority, that the decision of any constitutional question or case could be.

Judge Bradley styles the decision in Hepburn *v.* Griswold "recent, made only by a bare majority, and during a period of public excitement, when the question had entered largely into the political discussions of the day." No doubt a decision gathers authority with age, and if it is to be reversed, it is less inconvenient to reverse it at an early date. But the date of a decision forms no element of the rule of *stare decisis*, so far as our reading goes. Five, it is true, are only a "bare" majority of eight, since four are not a majority of eight; but five are also a full and an absolute majority of eight. And in this connection, it should be remembered that the decision of the last legal-tender case was

[1] 12 Wall. 528, 572.

made by a "bare" majority of five to four! A majority less in ratio to the minority than in Hepburn *v.* Griswold.

Judge Bradley also remarks, as above seen, on the "public excitement" surrounding the question; but he could hardly have meant to seriously urge that such influences had disappeared between January, 1870, and May 1, 1871!

We add here, merely in the historical spirit, that no one will doubt that Hepburn *v.* Griswold was argued far more ably and fully, at least for the respondent, than was the same side in the later cases. Let one examine the reports on this point, if one doubts.[1]

There is, then, nothing left of the reasons assigned for the disregard of *stare decisis* in the last legal-tender decisions except the idea, hinted, but not laid down, that constitutioual cases may be exempted from the rule which governs in cases of private interest.

This brings us to the inquiry, whether there is or ought to be a different rule in the former cases?

The rule of *stare decisis* may be styled a rule of convenience, in the high sense of that word, — a rule which has been established in order to promote certainty and steadiness in the declaration and application of the law. There are no higher objects of the law or its administration. *Misera est servitus, ubi jus vagum aut incertum.* Without going far into the grounds of the rule, it may be compendiously said that it has found a firm lodgment in all well-developed or permanent systems of law, — Roman, French, Prussian, English, and American. It rests on an obvious sense of justice as well as of convenience. "Law, to be obeyed or followed, must be known; to be known it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths.

What is there to soften the rigor or abate the force of this rule as applied to the decisions of constitutional questions coming before courts? It will hardly be claimed that convenience does not call for certainty in constitutional law as loudly as in other matters or kinds of law. Judges Strong and Bradley dwell on the far-reaching public consequences of the decision of constitutional questions, especially of "questions of constitutional power." No

[1] 8 Wall. 603; 12 Wall. 457.

one questions it; but it might seem that this consideration was one chief reason for holding steadily by such a decision made upon full argument, and careful consideration by a full court. We would admit all the considerations, all the qualifications, urged by these most accomplished and upright judges, — though we do not see how they applied to the legal-tender decisions of 1870, — but we cannot feel their force in constitutional questions so much even as in matters of private right.

Whether, however, it was right and wise to reverse the first legal-tender decision or not, or whether that case was a fair exception to the rule or not, it would at first view appear to be more inconvenient for the whole people to be in doubt as to matters of constitutional construction, than for a comparatively few to be in doubt as to some point of commercial law, for example. A rule of constitutional construction can hardly be changed with less inconvenience or disadvantage to the public than one of private concern only.

It must be conceded always that if a decision is wrong, clearly wrong in principle or on the facts (and this is to be determined on the conscience of the court called to examine it), it may be, or even ought to be, reversed. No less, an exception to *stare decisis* seems tenable or practicable. This is as true, it seems in reason, of public cases as of private cases, of cases of constitutional law or power as of cases of private right, and no more so. Our inquiry now is, Is the rule less applicable in any respect to cases of the former class than to those of the latter?

If the view here suggested is supported or opposed by any authorities or reasons, we do not know where, better than in the HARVARD LAW REVIEW, one may look for their discovery and presentation.

We know of no authorities which have discussed or answered our inquiry; we do not even know that it is regarded in the forum of the profession or of jurists and judicious law-writers as an open question; but the circumstances to which we have alluded above may, perhaps, have warranted our inquiry and our observations on it.

D. H. Chamberlain.

NEW YORK, April 29, 1889.